

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUST FILM, INC.; RAINBOW BUSINESS SOLUTIONS, doing business as PRECISION TUNE AUTO CARE; BURLINGAME MOTORS, INC.; DIETZ TOWING, INC.; THE ROSE DRESS, INC.; VOLKER VON GLASENAPP; JERRY SU; VERENA BAUMGARTNER; TERRY JORDAN; LEWIS BAE; and ERIN CAMPBELL, on behalf of themselves, the general public and those similarly situated,

Plaintiffs,

v.

MERCHANT SERVICES, INC.; NATIONAL PAYMENT PROCESSING; UNIVERSAL MERCHANT SERVICES, LLC; UNIVERSAL CARD, INC.; JASON MOORE; NATHAN JURCZYK; ROBERT PARISI; ERIC MADURA; FIONA WALSH; ALICYN ROY; MBF LEASING, LLC; NORTHERN FUNDING, LLC; NORTHERN LEASING SYSTEMS, INC.; GOLDEN EAGLE LEASING, LLC; LEASE SOURCE-LSI, LLC; LEASE FINANCE GROUP, LLC; JAY COHEN; LEONARD MEZEI; SARA KRIEGER; BRIAN FITZGERALD; SAM BUONO; MBF MERCHANT CAPITAL, LLC; RBL CAPITAL GROUP, LLC; WILLIAM HEALY; JOSEPH I SUSSMAN; JOSEPH I. SUSSMAN, P.C.; and SKS ASSOCIATES, LLC,

Defendants.

No. C 10-1993 CW  
ORDER DENYING  
MOTION TO STAY OR  
TRANSFER, DENYING  
WITHOUT PREJUDICE  
MOTION FOR  
PROTECTIVE ORDER  
AND CLARIFYING  
ORDER OF AUGUST  
29, 2011 (Docket  
No. 303)

In a single joint motion, Defendant SKS Associates, LLC, moves for a stay pending its appeal of the Court's order denying its motion to compel arbitration with Plaintiff Erin Campbell, Defendant MBF Leasing, LLC moves for a stay or transfer of

1 Plaintiffs' breach of contract claim against it and Defendant  
2 Northern Leasing Systems, Inc. moves for a stay or transfer of  
3 Plaintiffs' Fair Credit Reporting Act (FCRA) claim against it.  
4 Defendants also seek protective orders limiting the scope of  
5 discovery against them. Plaintiffs oppose the motion. The matter  
6 has been taken under submission on the papers. Having considered  
7 the papers filed by the parties, the Court DENIES Defendants'  
8 motion. The Court also clarifies its August 29, 2011 Order.  
9

#### 10 BACKGROUND

11 The facts relevant to this motion are largely set forth in  
12 this Court's Orders of June 13, 2011, August 29, 2011 and August  
13 30, 2011. Only the additional facts necessary to resolve the  
14 instant motion are provided below.

15 Prior to the filing of this action, two class action lawsuits  
16 were filed in the Supreme Court of the state of New York against  
17 certain Defendants in the instant case. In Pludeman v. Northern  
18 Leasing Systems, et al., Index No. 04/101059, filed in 2004 and  
19 still ongoing, the plaintiffs are pursuing a breach of contract  
20 claim on behalf of a certified class against Northern Leasing,  
21 alleging that it improperly charged class members a monthly "loss  
22 damage waiver" fee that was not disclosed on the first page of  
23 their lease. Second Amended Complaint ¶ 323. In Aldrich v.  
24 Northern Leasing Systems, Inc., Index No. 07/602803, filed in  
25 2007, the plaintiffs are pursuing claims under the Fair Credit  
26 Reporting Act (FCRA) and the New York state law equivalent against  
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1 Northern Leasing for accessing their credit reports without  
2 permission. Simplicio Decl. ¶ 14, Ex. I ¶¶ 63(a)(i)-(ii).

3 On August 30, 2011, this Court denied without prejudice SKS's  
4 first motion to stay proceedings pending its appeal of the order  
5 denying its motion to compel arbitration and granting Plaintiffs'  
6 motion for a preliminary injunction against it. In that order,  
7 the Court granted SKS leave to renew its motion if it could  
8 establish that discovery has become unduly burdensome. The Court  
9 stated that the renewed motion to stay should be accompanied by  
10 some evidence that the monies SKS seeks to collect from Plaintiff  
11 Campbell are for taxes actually owed and paid during her lease  
12 term.  
13

#### 14 DISCUSSION

##### 15 I. SKS's Motion to Stay Pending Appeal

16 "A stay is not a matter of right, even if irreparable injury  
17 might otherwise result." Nken v. Holder, 129 S. Ct. 1749, 1760  
18 (2009) (citation and internal quotation marks omitted). Instead,  
19 it is "an exercise of judicial discretion," and "the propriety of  
20 its issue is dependent upon the circumstances of the particular  
21 case." Id. (citation and internal quotation and alteration marks  
22 omitted). The party seeking a stay bears the burden of justifying  
23 the exercise of that discretion. Id.  
24

25 "A party seeking a stay must establish that he is likely to  
26 succeed on the merits, that he is likely to suffer irreparable  
27 harm in the absence of relief, that the balance of equities tip in  
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1 his favor, and that a stay is in the public interest." Humane  
2 Soc. of U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009); see  
3 also Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1135 (N.D.  
4 Cal. 2010). The first two factors of this standard "are the most  
5 critical." Nken, 129 S. Ct. at 1761. Once these factors are  
6 satisfied, courts then assess "the harm to the opposing party" and  
7 weigh the public interest. Id. at 1762.

8  
9 With the renewed motion, SKS submits what it purports is  
10 evidence that it seeks to collect from Campbell taxes actually  
11 owed and paid during her lease term. However, as Plaintiffs point  
12 out, this evidence is not credible for a variety of reasons. SKS  
13 submits the declaration of Dinesh Kulangroth, Vice President of  
14 Northern Leasing, from whom SKS "purchased the right to  
15 reimbursement for certain taxes and fees," accompanied by  
16 documents that Mr. Kulangroth states are evidence that Northern  
17 Leasing made payments on behalf of Campbell for the periods July  
18 1, 2006 through June 30, 2007 and July 1, 2007 through June 30,  
19 2008. Kulangroth Decl. ¶¶ 2-5. Mr. Kulangroth also attests that  
20 it is his "understanding that taxes were paid by the lessor on  
21 behalf of [Campbell] in prior years as well," but does not  
22 indicate that this statement is based on his personal knowledge.  
23 Id. at ¶ 4.

24  
25  
26 Campbell's lease was terminated in June 2007 and thus any  
27 payments between July 1, 2007 through June 30, 2008 were not  
28 within her lease period.

1 The documents related to the time period from July 1, 2006  
2 through June 30, 2007 also lack foundation or otherwise lack  
3 credibility. Mr. Kulangroth provides a property tax bill from the  
4 County of Santa Clara for this time period assessing taxes in the  
5 amount of \$490.31, a "corresponding" check made payable to the  
6 Santa Clara Tax Collector dated February 28, 2007 in the amount of  
7 \$45,746.46, and a "backup spreadsheet" that Mr. Kulangroth states  
8 shows that the tax bill and payment included monies paid on behalf  
9 of Campbell. Kulangroth Decl. ¶ 2, Exs. A, B, C.

11 The property tax bill shows taxes assessed upon "GCN Holdings  
12 LLC" for the time period July 1, 2006 through June 30, 2007.  
13 Kulangroth Decl. ¶ 2, Ex. A. Neither SKS nor Mr. Kulangroth  
14 explains who GCN Holdings is or how an assessment upon GCN  
15 Holdings could be related to Campbell's lease with Northern  
16 Leasing. Mr. Kulangroth does not describe his relationship with  
17 GCN Holdings and does not provide any basis for finding that he is  
18 able to authenticate the document.

20 The check made payable to the Santa Clara Tax Collector was  
21 issued by "PFSC / Northern Leasing Systems," not GCN Holdings, and  
22 it is for an amount that is dramatically different than the amount  
23 on the property tax bill. Kulangroth Decl. ¶ 2, Exs. A, B. It  
24 is thus not clear that this check is related to the tax bill.

26 The spreadsheet also lacks foundation and is otherwise  
27 unreliable. Mr. Kulangroth does not authenticate the document or  
28 describe his knowledge of it. It is not clear if this document is

1 from the records of Northern Leasing, GCN Holdings, SKS or some  
2 other entity, or when it was created. There are also a number of  
3 indications that this document is not credible. Several columns  
4 of the spreadsheet are missing data in all rows except two that  
5 purportedly relate to "Sunclare/Silicon Valley Pet C." Kulangroth  
6 Decl. ¶ 2, Ex. C. However, the lease number in these two rows  
7 differs from the lease number on Campbell's lease and from the  
8 lease number on the letter that SKS sent to Campbell. Compare  
9 Kulangroth Decl. ¶ 2, Ex. 3 (spreadsheet with lease number 001-  
10 0484101-00) with Krieger Decl. in Support of Mot. to Compel  
11 Arbitration, Ex. 1, at 3 (Campbell's lease with lease number  
12 673597), and Campbell Decl. in Support of Mot. for Prelim. Inj.,  
13 Ex. A, at 1 (SKS letter to Campbell referencing lease number  
14 0722579A). It is also not clear how this spreadsheet relates to  
15 the check and the tax bill. There is nothing that correlates the  
16 spreadsheet to the check paid to the Santa Clara Tax Assessor, and  
17 the tax rate in the spreadsheet differs from that on the tax bill.  
18 Kulangroth Decl. ¶ 2, Exs. 1-3.

21 Further, even if this evidence were credible, the spreadsheet  
22 would establish that the actual taxes paid on behalf of Campbell  
23 totaled \$2.35 for 2006 through 2007 and that no fees were assessed  
24 for this time period, while SKS seeks to collect \$85.50 from  
25 Campbell. Thus, the spreadsheet does not establish that the  
26 amount that SKS seeks to collect is for taxes actually owed and  
27 paid.  
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1 SKS responds to the lack of foundation and the various  
2 inconsistencies in these documents by arguing that these arguments  
3 "challenge the weight of the evidence," which can only properly be  
4 decided by "the arbitrator." Reply, at 1-2. SKS misunderstands  
5 the Court's reason for suggesting that it present evidence of the  
6 merits of its position, which was to assess its likelihood of  
7 success. SKS fails to bolster its showing.

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9 The Court notes that SKS could have, but did not, seek a stay  
10 from the Ninth Circuit. Accordingly, SKS's motion to stay is  
11 DENIED.

12 II. MBF and Northern Leasing's Motion to Stay or Transfer of  
13 Claims

14 MBF and Northern Leasing move to stay the claims against them  
15 to be stayed or to transfer them to the Supreme Court of the State  
16 of New York based upon the first-to-file rule, arguing that the  
17 earlier filed New York state actions should take priority over  
18 this later filed federal action involving some overlapping issues.

19 While this Court may transfer a case to another federal  
20 district court under certain circumstances pursuant to 28 U.S.C.  
21 §§ 1404 and 1406, MBF and Northern Leasing cite no authority that  
22 would give this Court authority to transfer the instant case to a  
23 state court, including the Supreme Court of the State of New York.  
24 Accordingly, MBF and Northern Leasing's motion to transfer is  
25 DENIED.  
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1       The first-to-file rule "is a generally recognized doctrine of  
2 federal comity which permits a district court to decline  
3 jurisdiction over an action when a complaint involving the same  
4 parties and issues has already been filed in another district."  
5 Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 94-5  
6 (9th Cir. 1982). This doctrine "gives priority, for purposes of  
7 choosing among possible venues when parallel litigation has been  
8 instituted in separate courts, to the party who first establishes  
9 jurisdiction." Northwest Airlines, Inc. v. American Airlines,  
10 Inc., 989 F.2d 1002, 1006 (8th Cir. 1993). Because "the first to  
11 file priority presumption has evolved from and is applied in cases  
12 involving intra-federal conflicts between federal district courts  
13 of concurrent jurisdiction" in order to promote efficiency and to  
14 avoid duplicative litigation, it "is not necessarily the guidepost  
15 for the setting here, where parallel litigation is pending in  
16 federal and state courts." Newmont USA Ltd. v. Am. Home Assur.  
17 Co., 2009 U.S. Dist. LEXIS 52365, at \*13 (E.D. Wash. June 21,  
18 2009) (citing Colorado River Water Conservation Dist. No. 7 v.  
19 United States, 424 U.S. 800, 817 (1976)). Indeed, each case that  
20 MBF and Northern Leasing cite in favor of the application of the  
21 first-to-file doctrine involves simultaneous actions in federal  
22 district courts.

23       "The Supreme Court has in fact repeatedly held that the  
24 pendency of an action in a state court is no bar to proceedings  
25 concerning the same matter in the federal court having  
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jurisdiction." Id. at \*13-14 (citing Exxon Mobil v. Saudi Basic Industries Corp., 544 U.S. 280, 293 (2005); McClellan v. Carland, 217 U.S. 268, 282 (1910)). The general rule regarding concurrent, duplicative litigation in state and federal court is that "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court," and that "whichever court rules first will, via the doctrines of res judicata and collateral estoppel, preclude the other from deciding that claim or issue." AmerisourceBergen Corp. v. Roden, 495 F.3d 1143, 1151-1152 (9th Cir. 2007) (citation and internal quotation and alteration marks omitted). This Court, and surely the New York Supreme Court, will guard against double recovery for Plaintiffs.

Accordingly, MBF and Northern Leasing have not established that the first-to-file rule requires that this action be stayed and their motion to stay the claims against them is DENIED.

### III. Motion for a Protective Order

Defendants SKS, MBF and Northern Leasing each request a protective order limiting the scope of Plaintiffs' discovery against them.

The Court DENIES without prejudice Defendants' motion for a protective order. If Defendants renew their motion, it must be accompanied by a certification that they have conferred or attempted to confer with Plaintiffs again in a good faith effort to resolve the dispute without court action and must comply with

1 Magistrate Judge Laporte's Order Regarding Discovery Procedures,  
2 Docket No. 313, in this case. Any renewed motion for a protective  
3 order shall be referred to Magistrate Judge Laporte in accordance  
4 with Docket No. 312.

5 The parties may use reciprocally the discovery obtained in  
6 this case, in the cases pending in the Supreme Court of the State  
7 of New York and in arbitration to the extent possible to avoid  
8 duplicative discovery, and shall prioritize discovery that is more  
9 relevant in light of the pending appeal and New York cases. Any  
10 discovery disputes will be referred to Magistrate Judge Laporte,  
11 after the parties have met and conferred.

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13 IV. August 29, 2011 Order

14 In their opposition, Plaintiffs note that this Court's August  
15 29, 2011 Order was less than clear regarding whether the Court had  
16 dismissed their claim against Northern Leasing alleging a  
17 violation of California's Unfair Competition Law (UCL), Cal. Bus.  
18 & Prof. Code §§ 17200, et seq. See Opp. at 2 n.1. In that Order,  
19 the Court found that Plaintiffs Volker Von Glasenapp and Lewis Bae  
20 stated an FCRA claim against several Defendants, including  
21 Northern Leasing. Docket No. 292, at 32. Later in the Order, the  
22 Court stated that "because Plaintiffs do not state claims [for  
23 violations of federal and state law] against Northern Leasing [and  
24 certain other Defendants], their UCL claims against these  
25 Defendants are dismissed." Id. at 35. However, in the Court's  
26 summary of its rulings, it omitted Northern Leasing from the list  
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1 of Defendants against whom the UCL claims were dismissed. See id.  
2 at 41.

3 Because the Court found that Plaintiffs Von Glasenapp and Bae  
4 did sufficiently allege a claim against Northern Leasing for a  
5 violation of the FCRA, they also sufficiently stated a UCL claim  
6 against Northern Leasing. The Court's August 29, 2011 Order did  
7 not dismiss these Plaintiffs' UCL claim against Northern Leasing.  
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9 CONCLUSION

10 For the foregoing reasons, the Court DENIES Defendants'  
11 motion to stay or transfer and DENIES without prejudice their  
12 motion for a protective order (Docket No. 303).

13 IT IS SO ORDERED.

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15 Dated: 1/3/2012

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17 CLAUDIA WILKEN  
18 United States District Judge  
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